

DATE: October 2, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-22170

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Marc E. Curry, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated August 27, 2002 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline G (Alcohol Consumption) and Guideline E (Personal Conduct). Administrative Judge Kathryn M. Braeman issued an unfavorable security clearance decision dated April 25, 2003.

Applicant appealed the Administrative Judge's unfavorable decision. The Board has jurisdiction under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

The following issues have been raised on appeal: (1) whether Applicant was improperly denied access to parts of a particular exhibit; and (2) whether the Administrative Judge's adverse conclusions under Guideline G (Alcohol Consumption) are arbitrary, capricious, or contrary to law. For the reasons that follow, the Board affirms the Administrative Judge's decision.

Scope of Review

On appeal, the Board does not review a case *de novo*. Rather, the Board addresses the material issues raised by the parties to determine whether there is factual or legal error. There is no presumption of error below, and the appealing party must raise claims of error with specificity and identify how the Administrative Judge committed factual or legal error. Directive, Additional Procedural Guidance, Item E3.1.32. *See also* ISCR Case No. 00-0050 (July 23, 2001) at pp. 2-3 (discussing reasons why party must raise claims of error with specificity).

When the rulings or conclusions of an Administrative Judge are challenged, the Board must consider whether they are: (1) arbitrary or capricious; or (2) contrary to law. Directive, Additional Procedural Guidance, Item E3.1.32.3. In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See, e.g.*, ISCR Case No. 97-0435 (July 14, 1998) at p. 3 (citing Supreme Court decision).

In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. Compliance with state or local law is not required because security clearance adjudications are conducted by the Department of Defense pursuant to federal law. *See* U.S. Constitution, Article VI, clause 2 (Supremacy Clause). *See, e.g.*, ISCR Case No. 00-0423 (June 8, 2001) at p. 3 (citing Supreme Court decisions).

When an Administrative Judge's factual findings are challenged, the Board must determine whether "[t]he Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge." Directive, Additional Procedural Guidance, Item E3.1.32.1. The Board must consider not only whether there is record evidence supporting a Judge's findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings, and whether the Judge's findings reflect a reasonable interpretation of the record evidence as a whole. Although a Judge's credibility determination is not immune from review, the party challenging a Judge's credibility determination has a heavy burden on appeal.

When an appeal issue raises a question of law, the Board's scope of review is plenary. *See* DISCR Case No. 87-2107 (September 29, 1992) at pp. 4-5 (citing federal cases).

If an appealing party demonstrates factual or legal error, then the Board must consider the following questions:

Is the error harmful or harmless? *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine);

Has the nonappealing party made a persuasive argument for how the Administrative Judge's decision can be affirmed on alternate grounds? *See, e.g.*, ISCR Case No. 99-0454 (October 17, 2000) at p. 6 (citing federal cases); and

If the Administrative Judge's decision cannot be affirmed, should the case be reversed or remanded? (Directive, Additional Procedural Guidance, Items E3.1.33.2 and E3.1.33.3)

Appeal Issues

1. Whether Applicant was improperly denied access to parts of a particular exhibit. On appeal, Applicant asserts: (a) Department Counsel had in its possession more parts of Exhibit A than Applicant did; (b) Applicant did not see parts of Exhibit A until the hearing; (c) Department Counsel failed to comply with the Administrative Judge's ruling that Department Counsel provide Applicant with a full copy of Exhibit A; and (d) if Applicant had known about the missing parts of Exhibit A he would have been willing to have his wife interviewed. The Board construes these arguments as raising the issue of whether Applicant was improperly denied access to portions of Exhibit A. For the reasons that follow, the Board concludes Applicant's arguments fail to demonstrate prejudicial error below.

To evaluate the merits of Applicant's claim of error, it is necessary to consider the sequence of events that occurred during the hearing. At the hearing, Applicant offered a two-page letter, dated January 6, 2002, which contained a medical doctor's evaluation of Applicant. The Administrative Judge marked the document as Exhibit A. Department Counsel objected to the admissibility of Exhibit A on the ground that an inadequate foundation had been laid. The Judge overruled Department Counsel's objection and admitted Exhibit A into evidence. ⁽¹⁾ Later in the hearing, Department Counsel advised the Judge that the copy of Exhibit A that he had in his possession contained six pages, not just the two-page letter that Applicant had submitted. The Judge directed Department Counsel to discuss the matter with Applicant off the record. After the matter was discussed off the record, the Judge asked "Any other comment that needs to be made on the record about this?" Department Counsel responded "No. He resolved the concern." Applicant said nothing on the record at that point concerning Exhibit A. ⁽²⁾ Still later in the hearing, Department Counsel raised a concern about the four pages that had not been included with Exhibit A and made a proffer that it was Department Counsel's understanding that Applicant had received only the two-page letter dated January 6, 2002 while Department Counsel had received that two-page letter plus four additional pages. The Judge directed the parties to go off the record so the matter could be discussed. After a brief period, the Judge went back on the record and stated that she was going to admit

into evidence as Exhibit A the two-page letter plus the four additional pages. Neither the Judge nor the parties made any statements or representations on the record as to what was discussed or stated off the record concerning Exhibit A. However, Applicant did not raise any objection to, or express any concern about, the Judge's decision to substitute all six pages for the original two-page Exhibit A. ⁽³⁾

The failure of the Administrative Judge and the parties to develop a full and complete record concerning Exhibit A makes it harder for the Board to address this appeal issue. Statements by Applicant and Department Counsel in their appeal briefs about Exhibit A that go beyond the record below cannot be considered (Directive, Additional Procedural Guidance, Item E3.1.29) and do not cure the failure of both parties to develop the hearing record with respect to Exhibit A. ⁽⁴⁾

Even making allowances for Applicant's *pro se* status, the Board concludes that Applicant has failed to show how he was prejudiced in any meaningful way by the way Exhibit A was introduced and handled during the hearing. If Applicant had any objections or concerns about the manner that Department Counsel had dealt with Exhibit A, then Applicant should have raised those objections and concerns at the hearing so the Administrative Judge could address them then. If Applicant had felt that the manner that Department Counsel had dealt with Exhibit A was interfering with his ability to present his case or otherwise respond to the evidence presented against him, then Applicant should have raised his concerns at the hearing so that the Judge could deal with them then. If Applicant was puzzled or confused about what the Judge was doing with respect to substituting the six pages for the two-page letter originally admitted as Exhibit A, then Applicant should have told the Judge he was puzzled or confused and asked for an explanation or clarification at the hearing. If Applicant felt that the Judge's decision to substitute the six pages for the two-page letter originally admitted as Exhibit A left him at a disadvantage unless he presented additional information to address matters covered by the additional pages, then Applicant should have spoken up and asked the Judge for additional time to present such additional information for the Judge's consideration. Applicant did none of these things. Furthermore, to the extent that the four pages added to the original two-page Exhibit A contain information that is favorable to Applicant's position at the hearing, he was not prejudiced by their introduction into evidence. Considering the record as a whole, the Board concludes Applicant has failed to show how the actions and inactions of Department Counsel with respect to Exhibit A prejudiced him any meaningful way.

2. Whether the Administrative Judge's adverse conclusions under Guideline G (Alcohol Consumption) are arbitrary, capricious, or contrary to law. On appeal, Applicant asserts: (a) he has been honest and truthful with the government during his investigation; (b) his alcohol abuse is a thing of the past and has not been repeated in recent years; (c) the persons who prepared the April 2002 evaluation of Applicant did not meet with him personally; (d) he always cooperated with alcohol treatment and counseling that he was referred to in the past; (e) he would not have reached his current position of responsibility and would not be able to perform his duties if he had an alcohol abuse problem; and (f) he would like to be able to better serve the U.S. military if he were allowed to work on classified matters. The Board construes these arguments as raising the issue of whether the Administrative Judge's adverse conclusions under Guideline G (Alcohol Consumption) are arbitrary, capricious, or contrary to law.

Applicant's desire to help the U.S. military by being allowed to work on classified matters is not at issue in these proceedings, and it is irrelevant to an evaluation of his security eligibility. However strong Applicant's desire may be, it does not demonstrate any error in the Administrative Judge's decision.

Applicant's honesty and truthfulness with the government about his history of alcohol use has not been challenged or placed into question by these proceedings. ⁽⁵⁾ However, Applicant's honesty and candor with the government do not preclude the government from evaluating the security significance of Applicant's history of episodic alcohol abuse. *See, e.g.*, ISCR Case No. 02-04924 (March 28, 2003) at p. 3 ("Even an honest applicant may pose a security risk based on conduct and circumstances unrelated to the applicant's truthfulness and veracity.").

Applicant's argument about not being personally interviewed by the persons who prepared the April 2002 evaluation of him is not frivolous, but it does not demonstrate the Administrative Judge erred. Applicant's argument goes to the weight of Government Exhibit 8, not to its admissibility. It was not arbitrary, capricious, or contrary to law for the Judge to take Government Exhibit 8 into account when making findings of fact and reaching conclusions about Applicant's history of alcohol abuse.

The rest of Applicant's arguments fail to persuade the Board that the Administrative Judge's adverse conclusions under Guideline G (Alcohol Consumption) are arbitrary, capricious, or contrary to law. Given the record evidence in this case, the Judge had a sufficient basis to draw adverse conclusions about Applicant's history of episodic alcohol abuse. Applicant's ability to argue for an alternate interpretation of the record evidence is not sufficient to demonstrate the Judge's conclusions are arbitrary, capricious, or contrary to law. *See, e.g.,* ISCR Case No. 98-0620 (June 22, 1999) at p. 3. Given the record evidence in this case, the Judge had a rational basis for expressing doubts about whether Applicant has successfully rehabilitated himself. Given those doubts, the Judge properly resolved them in favor of the national security. *See* Directive, Enclosure 2, Item E2.2.2.

Conclusion

Applicant has failed to demonstrate error below that warrants remand or reversal. Accordingly, the Board affirms the Administrative Judge's adverse security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. Hearing Transcript at pp. 24-29.

2. Hearing Transcript at pp. 47-48.

3. Hearing Transcript at pp. 94-96.

4. Department Counsel's assertion that a complete copy of Exhibit A was sent to Applicant during this appeal (Reply Brief at p. 4) is not part of the record evidence, and in any event that assertion is irrelevant to the merits of Applicant's appeal issue. If Applicant had been prejudiced by the way that Exhibit A was introduced and handled during the hearing, such prejudice would not be cured by Department Counsel providing Applicant with a complete copy of Exhibit A on appeal.

5. SOR paragraph 2.a alleged that Applicant falsified a security clearance application in June 1999 by failing to list certain overdue debts. That SOR allegation was resolved in Applicant's favor and is not at issue on appeal.